STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, PLACER HILLS CHAPTER NO. 636,	)	
Charging Party,	)	Case No. S-CE-384
v.	)	PERB Decision No. 262
PLACER HILLS UNION SCHOOL DISTRICT,	)	November 30, 1982
Respondent.	)	

Appearances; Gifford D. Massey, Field Representative for the California School Employees Association and its Placer Hills Chapter No. 636; Douglas A. Lewis, Attorney for the Placer Hills Union School District.

Before Gluck, Chairperson; Tovar and Jaeger, Members.

DECISION

GLUCK, Chairperson: The California School Employees Association and its Placer Hills Chapter No. 636 (CSEA) except to a hearing officer's dismissal of charges alleging that the Placer Hills Union School District (District) violated subsection 3543.5(c) of the Educational Employment Relations Act (EERA)[1] by unilaterally terminating Robert J. Ledbetter,

[1]EERA is codified at Government Code section 3540, et seq., and all references are to the Government Code unless otherwise indicated.

Section 3543.5 provides, in relevant part:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals

who was employed under the federally funded Comprehensive Employment Training Act (CETA), without negotiating either the decision or the effects of the termination with the exclusive representative. CSEA filed no exceptions to the hearing officer's dismissal of its other charges that the District violated subsections 3543.5(a) and (b) by taking reprisal against Ledbetter because of his participation in protected activities.

The Public Employment Relations Board (PERB) finds the hearing officer's attached statement of facts to be free from prejudicial error and adopts them as its own.

DISCUSSION

CSEA excepts to the hearing officer's findings that the District had a past practice of terminating CETA-funded employees and that CSEA was attempting to negotiate a change in that practice. It contends that no general layoff policy existed for classified employees, the District having rejected CSEA's proposals for layoff procedures during contract

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> on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

negotiations which took place at the time of Ledbetter's termination. CSEA also contends that the District must treat CETA employees as classified employees under the California Education Code, and seems to argue that the past practice, if any, for terminating CETA employees, resulted from the District's unlawful distinction between CETA and classified employees.

The gravamen of CSEA's charge is that the District violated subsection 3543.5(c) by unilaterally changing the District's layoff policy without first meeting and negotiating with the employee organization when it terminated Ledbetter.

In Grant Joint Union High School District (2/26/82) PERB Decision No. 196, the Board held that for a charging party to state a prima facie violation of subsection 3543.5(c) when a unilateral change is charged, it must allege facts sufficient to show: (1) that the District breached or otherwise altered the parties' written agreement or its own established past practice; (2) that the breach or alteration amounted to a change of policy (i.e., that it had a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members); and (3) that the change in policy concerned matters within the scope of representation. CSEA failed to prove that the District, in this instance, altered or breached its established practice. The District consistently terminated CETA employees for whom federal funding ended, following the same procedures used in dealing with Ledbetter.

We do not consider CSEA's claim that the District practice contravenes Education Code provisions concerning layoff of classified employees. The question before PERB is not whether the District's practice violates the Education Code, but whether it was changed in violation of EERA.[2]

ORDER

Based on the record before the Public Employment Relations Board, the charges filed by the California School Employees Association and its Placer Hills Chapter No. 636 are hereby DISMISSED.

Members Tovar and Jaeger joined in this Decision.

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[2]Compare Jefferson School District (6/19/80) PERB Decision No. 133 and Healdsburg Union High School District (6/19/80) PERB Decision No. 132 where the Board reviewed the Education Code to determine whether negotiating proposals were in direct conflict with it and were outside of scope. See also San Bernardino City Unified School District (10/29/82) PERB Decision No. 255.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSN.
and its PLACER HILLS CHAPTER No. 636,

Charging Party,

v.

PLACER HILLS UNION SCHOOL DISTRICT,

Respondent.

Unfair Practice
Case No. S-CE-384

PROPOSED DECISION
(6/4/81)

Appearances; Gifford D. Massey, Field Representative, for the California School Employees Association and its Placer Hills Chapter No. 636; Douglas A. Lewis, Attorney, for the Placer Hills Union School District.

Before Ronald E. Blubaugh, Hearing Officer.

PROCEDURAL HISTORY

In this case an employee organization contends that a public school employer discriminatorily laid off a unit member because of that member's participation in protected activities. The organization further contends that the employee, who worked under a federal jobs program, was several times discriminatorily passed over for a regular district position. The employer responds that the worker was laid off in accord with the rules of the federal program and that his failure to obtain a regular district job was due to the employer's selection of persons who received higher scores on civil service examinations. As an affirmative defense, the employer also asserts that the charge was not filed within a

statutory six-months' period of limitation.

This charge originally was filed by the California School Employees Association and its Placer Hills Chapter No. 636 (hereafter CSEA) on December 12, 1980. The charge alleges that the Placer Hills Union School District (hereafter District) violated Government Code section 3543.5(a), (b) and (c)[1] by terminating employee Robert J. Ledbetter from his position as a custodian in retaliation for his "aggressive action in pursuing several grievances filed to protect and to retain his job."

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[1] Government Code section 3543.5 provides as follows:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
>
> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.
>
> (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

The charge alleges that the termination occurred on June 12, 1980, and that the unilateral nature of the separation "without following procedures required by law" and without prior negotiating also violated section 3543.5(b) and (c) (all references are to the Government Code unless otherwise indicated).

On December 31, 1980, the District responded to the charge, specifically admitting that "Robert J. Ledbetter was employed by Respondent under the Comprehensive Employment Training Act (CETA) on or about December 15, 1978, and that Ledbetter was terminated on or about June 12, 1980, when his eligibility under CETA expired." The District makes certain other admissions but denies that any of its conduct was in violation of any provision of the Educational Employment Relations Act (Government Code section 3540 et seq., hereafter EERA). The District also moved to dismiss the charge and/or particularize it. The District did not at that time raise the affirmative defense that the charge concerned events outside the statutory period of limitations.[2]

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[2]Government Code section 3541.5 provides, in relevant part, as follows:

> . . . . . .
>
> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:

A settlement conference in this matter was conducted on January 27, 1981. The settlement effort was not successful and the hearing officer, apparently in response to the District's request for an order to particularize, directed the charging party to file further specific factual allegations. A complaint and notice of hearing was issued on February 4, 1981, by the chief administrative law judge.

On February 10, 1980, the charging party filed an amendment to the charge. The amendment incorporated the allegations in the original charge and supplemented them with additional factual allegations in support of the underlying contentions. An amended complaint was issued on February 11, 1981, by the Office of the Chief Administrative Law Judge.

The hearing was conducted on February 25, 1981, in Auburn. During the hearing, the District for the first time raised the affirmative defense that the charge was time-barred by the statutory period of limitations. A District motion for summary

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> (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge;
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> . . . . . .
>
> The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery.

judgment was denied but the District was given the option of renewing the motion following the presentation of evidence. Both parties submitted post-hearing briefs and the case was submitted on April 28, 1981. In its brief, the District reasserted the affirmative defense that the charge was not filed within the statutory period of limitation.

FINDINGS OF FACT

The Placer Hills Union School District is an elementary school district offering instruction in kindergarten through the eighth grade. The District, which enrolls approximately 1,000 students, is located in Placer County. The parties stipulated that the District is a public school employer and that CSEA is an employee organization as those terms are defined in the EERA. From 1976 and at all times relevant, CSEA has been the exclusive representative of the classified employee unit which at the time of the hearing had approximately 70 members.

Robert Ledbetter, the aggrieved party in this case, went to work in District schools as a custodian/groundskeeper during the month of June, 1978. He was employed under the federally funded Comprehensive Employment Training Act (hereafter CETA). Mr. Ledbetter first learned of the position when he was called by the Placer County Manpower Office, the coordinating agency for CETA programs in that county. He was directed to report to the Manpower Office and complete an application. He then was

sent to the Placer Hills district where he was hired by Pete Neese, the District supervisor of transportation and maintenance.

Although he worked in schools of the Placer Hills District and at the direction of Placer Hills supervisors during 1978, Mr. Ledbetter actually was on the payroll of the Roseville Union High School District. This anomaly grew out of county arrangements to meet CETA funding requirements. In December of 1978, Mr. Ledbetter completed a Placer Hills employment application and then went onto the Placer Hills payroll as a CETA employee.

Under federal rules, there is a maximum amount of time a CETA-funded worker can remain on a job. Mr. Ledbetter testified that he was informed of this limitation when he went on the Placer Hills payroll about December 15, 1978. The time limitation which pertained to Mr. Ledbetter was 18 months. Mr. Ledbetter testified that in the spring of 1980 he knew his time deadline was approaching. On May 19, 1980, the Placer County CETA Program office notified the District that Mr. Ledbetter had reached his maximum period of benefits and was to be terminated on June 7, 1980. The county directed the District to notify him at least two weeks prior to that date.

Edward Vanderpool, the District's maintenance foreman, testified that on May 23, 1980, he gave Mr. Ledbetter written

notice that he would be terminated after completion of work on June 6. A copy of the notice with the handwritten notation, "Given to Bob 5-23-80" was received in evidence. Mr. Ledbetter testified that he was not given the letter but that a copy was shown to him by Mr. Vanderpool sometime around June 1.3

Mr. Ledbetter's last day of work was June 6, 1980. At the June 12, 1980, meeting of the District Board of Trustees the board approved without discussion the termination of Mr. Ledbetter. The reason given in the minutes was "time limitation completed."

Over the years it participated in the program, the District had a total of 12 to 14 CETA workers. Of these, three were terminated when their eligibility period was completed, four were hired by the District for regular jobs and the remainder quit to accept other employment. On September 30, 1980, the District ceased further participation in the CETA program.

Mr. Ledbetter attempted three times to secure a regular District position. Two of those attempts came just before he was terminated and the last occurred after he no longer was in

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[3]This evidence is relevant only to CSEA's contention that the dismissal of Mr. Ledbetter was not in accord with the requirements of the Education Code, whether or not the dismissal of Mr. Ledbetter violated the Education Code is not a matter within the jurisdiction of the Public Employment Relations Board. It is not necessary, therefore, to resolve the factual dispute about when Mr. Ledbetter received notice of layoff.

the District's employment. Mr. Ledbetter's unsuccessful efforts began in early 1980 when the District had two openings for custodians in regular District-funded positions. There were 30 applicants for the positions. A three-member panel was assembled to screen and rank the candidates and to make recommendations to the District administration. The members of the panel were Pete Neese, District supervisor of maintenance, Mike Coder, the principal of a District school, and Jim Jordan, operations supervisor for the Placer Union High School District.

After screening the applications, the panel selected eight applicants for interviews to be held on February 7 and 8, 1980. Mr. Ledbetter was one of those finalists. Each member of the panel separately graded each of the candidates by assigning them numerical scores. Analysis of the individual score sheets written by the panel members shows that each of them ranked Mr. Ledbetter fifth. A composite score, derived by adding the scores given by each panel member also placed Mr. Ledbetter in fifth place with a grade of 123 out of a maximum possible score of 210.

The candidate who received the highest composite grade was Thomas Woods and he was hired for the position. Mr. Woods was a CETA employee who first had gone to work for the District in August of 1978. He is the father-in-law of District maintenance foreman Vanderpool but Mr. Vanderpool had no

apparent role in the selection process. Mr. Woods did not belong to CSEA.

Shortly thereafter, the District used the same list of applicants to hire Kelly Jones as a custodian. Mr. Jones had been ranked third by the February 8 screening committee.[4] Mr. Jones, who like Mr. Ledbetter was a CETA worker, had been employed by the District approximately three months at the time he was hired as a custodian. His first job with the District was as a carpenter/painter. He was not a member of CSEA.

On March 31, 1980, Mr. Ledbetter filed a formal grievance over the selection of Thomas Woods rather than him for a custodial position. On April 1, 1980, Mr. Ledbetter filed a formal grievance over the selection of Kelly Jones rather than him for a custodial position. George Dunham, District superintendent of schools, denied both grievances on June 17, 1980. Neither Mr. Ledbetter nor CSEA appealed the denial of the grievances to the Board of Trustees within the contractual time limits. On July 23, 1980, CSEA chapter president Dale Roberts demanded that the grievances be heard by the school board. However, on July 28 this request was rejected by the superintendent for failure to comply with the time limits in the contract between the parties.

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[4] No evidence was introduced about the candidate who received the second highest score. The record does not reflect whether or not that person was ever offered a job.

The third position unsuccessfully sought by Mr. Ledbetter came open in the summer of 1980. A notice announcing the position was posted for "in-house" applicants on July 14, 1980. Interviews were conducted on August 1, 1980, among the four applicants. The members of the panel were maintenance Supervisor Neese, Eric Steele, a District maintenance worker who at the time was acting foreman, and Pete Keesler, the principal of a District school. The applicants were Mr. Ledbetter, two District CETA workers and a long-term substitute custodian, Anita Kolitsch. Mr. Steele testified that following the interviews, Mr. Neese stated in reference to Ms. Kolitsch, "This is who I want." Although he was not told to do so, Mr. Steele took it on himself as a result of his comment to raise the score he assigned to Ms. Kolitsch. He testified that he took this action on the basis of his "knowledge of the whole situation." Mr. Steele testified that he was not threatened or coerced in any way into raising Ms. Kolitsch's test score. The testimony of Mr. Steele is credited.

Analysis of the individual score sheets written by the panel members shows that individually they ranked Mr. Ledbetter third or fourth and collectively he was third. Ms. Kolitsch, who ultimately received the job, was ranked second but her

composite score was twice as high as that given to Mr. Ledbetter.[5]

Both in his grievances and in the present charge, Mr. Ledbetter attributes his failure to receive one of these jobs to retaliation against him for the filing of grievances. During his time with the District, Mr. Ledbetter did file several grievances. At least one of these - a grievance in which he alleged he was improperly docked in pay for two days of sick leave - was settled to his satisfaction. The superintendent directed that the money be repaid.

The most serious matter raised by Mr. Ledbetter was not actually a grievance but a complaint against conduct by Mr. Neese. Mr. Ledbetter charged Mr. Neese with being intoxicated on school property and of acting abusively toward Mr. Ledbetter, his fiancee and her brother. The incident occurred on November 30, 1979, at the school where Mr. Ledbetter was employed as a custodian. With the permission of his immediate supervisor, Mr. Ledbetter left work that day to select an engagement ring. At about 7:30 p.m., his fiancee came down to the school to see the ring. The fiancee brought her brother, who was about 20, along with her.

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[5]The person who scored first on his civil service examination resigned his position with the District to accept a non-CETA job elsewhere.

Mr. Ledbetter's fiancee and her brother remained for a while in the classroom where Mr. Ledbetter was working. The brother then decided to leave and he went out of the classroom where he was intercepted by Mr. Neese. Mr. Neese brought him back into the classroom and then demanded to know the identity of the two visitors. The parties had words with each other and Mr. Neese stated that he was going to have the two visitors arrested as trespassers.

At that point, Mr. Ledbetter called CSEA chapter president Roberts and told him what was going on. Mr. Neese took the phone from Mr. Ledbetter, stating that the incident was not a union affair. Mr. Neese then spoke for a time with Mr. Roberts. After the telephone conversation, Mr. Neese continued to insist he would have the pair arrested and directed them to follow him. Mr. Ledbetter told his fiancee to come with him rather than Mr. Neese. Her brother, on his own, left school property. During the course of this incident, angry words were exchanged between Mr. Neese and Mr. Ledbetter.

The following Monday Mr. Ledbetter filed the complaint with the superintendent about Mr. Neese's conduct. The superintendent investigated the charge but took no action, initially. Under the continued prodding of Mr. Ledbetter and the CSEA the District school board on April 1, 1980, conducted a hearing on Mr. Ledbetter's charge that Mr. Neese had violated District policies. The specific policies of which Mr. Neese

was accused of violating were prohibitions against "wantonly offensive conduct or language toward other employees, pupils or the public" and "habitual intoxication, intoxication or drinking of alcoholic beverages while on duty." On April 2, the members of the school board dismissed the allegations against Mr. Neese.

Fear about the attitudes of administrators toward unions has caused some District employees to be cautious in approaching union membership. It is the credited testimony of Mr. Ledbetter that he was advised by coworkers when first hired that he should not join CSEA. The coworkers told him that supervisors did not care for union activists. Mr. Ledbetter took this advice and did not at first join CSEA. He did not join CSEA until September of 1979 or later. After he did join, Mr. Ledbetter, by his own choice, was not an organization activist. He was not a CSEA officer and he did not regularly attend CSEA meetings.

One of those who advised Mr. Ledbetter against joining CSEA was Eric Steele, a District maintenance worker. Mr. Steele is a sometime-member of CSEA. Originally employed by the District in 1974, he belonged at first to the now defunct Placer Hills School Employees Association. After CSEA formed a Placer Hills chapter, he joined the organization and remained a member until about 1977 when he dropped out for about six months. He rejoined later in 1977 and remained a member until 1978 when he

quit for financial reasons. He remained out of CSEA until 1980 when he rejoined. He was a member on the date of the hearing. During the various periods when he was not a member of CSEA, Mr. Steele was promoted to better positions. Although he expressed a belief that the promotions were due to his status as a nonmember, no District official told him such.

Mr. Steele testified that on one occasion he was told by Mr. Neese and by Fred Machado, the supervisor of transportation, that being a member of CSEA was not in his "better interest." He also testified that Mr. Machado, two weeks prior to the hearing, said to him:

> Eric, this union stuff is going to get you in trouble because you're too gung-ho for this union and it's going to cause you trouble around here.

Mr. Machado denied that he had made such a statement. The testimony of Mr. Steele on this point is credited. Although still employed by the District, he was not afraid to testify adversely to his employer's interests.[6] During extensive questioning and cross-examination, he answered questions forthrightly. He did not appear prone to exaggerate events and was not hesitant in giving answers not favorable to himself.

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[6]See generally, Southern Paint & Waterproofing Co., Inc. (1977) 230 NLRB 429 [95 LRRM 1446]; UNARCO Industries (1972) 197 NLRB 489 [80 LRRM 1621].

The administrator about whom CSEA witnesses appeared to have the most concern was Mr. Neese. Mr. Neese's approach to employee organizations can be seen in an incident where CSEA President Roberts was denied permission to be absent from work one evening to attend a CSEA meeting. The meeting was held during a time when the parties were in negotiations. Even though it was the previous practice that Mr. Roberts could be excused from his evening duties as a custodian in order to attend CSEA meetings, on that particular day when Mr. Roberts called the District office and requested permission to attend a meeting, Mr. Neese denied it. He told Mr. Roberts that because the right to be absent from work for such meetings was not in the contract, he could not attend. Mr. Roberts did not attend the meeting. Subsequently, CSEA filed an unfair practice charge about the incident and the parties settled the case without the necessity of a hearing.[7] under the terms of the settlement, the District agreed to grant released time for the CSEA president to attend chapter meetings.

Mr. Roberts also testified that Mr. Neese has told him he was a union "disorganizer" from his previous employment and that he frowned upon union activity. Mr. Neese denied that he made such a statement and contended that he was a union

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[7]The prior charge, S-CE-344, was withdrawn by CSEA on June 11, 1980.

organizer in his previous job at McClellan Air Force Base. The testimony of Mr. Roberts is credited and the denial of Mr. Neese is not. Considered in the context of the other evidence and on the basis of observing both witnesses on the stand, it is easier to believe that Mr. Neese made derogatory comments about participation in union affairs than to believe his denials.

Finally, CSEA presented evidence about a grievance meeting in February of 1979 where the superintendent allegedly became so angry that he started kicking furniture and throwing books against the wall. CSEA President Roberts testified that at the start of the meeting the superintendent called the grievance, which involved the New Year's Holiday, "goddamn mickey-mouse" and then commenced throwing notebooks against the wall. When he became a witness, Supt. Dunham acknowledged that he had probably called the grievance "mickey-mouse." During direct examination he did not deny that he had thrown books or kicked furniture but responded to questions with conditional, rhetorical answers. On cross-examination when he was asked directly whether he threw books or binders, Mr. Dunham denied that he had done so.

The testimony of Mr. Roberts about the grievance meeting is credited and the superintendent's account is not. The superintendent was evasive in his initial answers about the

incident and he appeared less than forthright while answering questions about it.

At a grievance meeting on June 9, 1980, and during a break at an unfair practice charge settlement conference on June 11, CSEA demanded that the District meet and negotiate about the layoff of Mr. Ledbetter. At the June 9th meeting, CSEA fully set forth its position, although not in writing. At the time CSEA made its demand to negotiate, the parties were in negotiations for a new contract. The prior agreement expired on June 30, 1979, and the successor agreement was not entered into until September 11, 1980.

LEGAL ISSUES

1. Is CSEA's charge time-barred under the six-months' limitation in section 3541.5?

2. If the charge is not time-barred, did the District violate section 3543.5(a) and/or (b) and/or (c) by:

A) Terminating the employment of Robert Ledbetter on or about June 12, 1980?

B) Failing to hire Robert Ledbetter for a regularly funded District position after interviews in February and August of 1980?

C) Refusing to negotiate about the layoff of Robert Ledbetter?

CONCLUSIONS OF LAW

Statute of Limitations

Section 3541.5(a) provides that the PERB shall not "issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge . . . ." Section 3541.5(a) is similar to and apparently modeled after section 10(b) (29 U.S. section 160(b)) of the National Labor Relations Act which establishes a six-month limitation for complaints issued by the general counsel. Cases interpreting section 10(b) hold that the section is a "statute of limitations and is not jurisdictional." Chicago Roll Forming Corp. (1967) 167 NLRB 961 [66 LRRM 1228], enf. sub. nom. NLRB v. Chicago Roll Forming Corp. (7th cir. 1969) 418 F.2d 346 [72 LRRM 2683]. The National Labor Relations Board (hereafter NLRB) has been reversed by a federal circuit court where it dismissed a charge on its own initiative, the court holding that the time limitation "is an affirmative defense, and if not timely raised, is waived . . . ." Shumate v. NLRB (4th cir. 1971) 452 F.2d 717 [78 LRRM 2905].

The issue in the present case is not, as the District would state, whether CSEA timely filed its charge. Rather, the issue is whether the District timely raised the statute of limitations. The PERB's rules provide at title 8, California Administrative Code section 32635(a) that the respondent "shall

file with the Board an answer within 20 calendar days or at a time set by the Board agent following the date of service of the charge by the Board Agent." The rules further provide at title 8, California Administrative Code section 32640 that the answer shall contain "(f) A statement of an affirmative defense."

The charge in the present case was filed with the PERB on December 12, 1980. It alleged in principal part that Robert Ledbetter had been terminated in retaliation for his "aggressive action in pursuing several grievances filed to protect and retain his job." The date of the alleged unlawful termination was tied in the charge to a meeting of the District school board on June 12, 1980. In its answer, the District admitted that "Mr. Ledbetter was terminated on or about June 12, 1980" and it did not raise the time limitations in section 3541.5.

Having admitted the charging party's contention that Mr. Ledbetter was dismissed on or about June 12, 1980, and having failed to raise the time limits defense in its answer, the District is barred from subsequently asserting that contention.

As to CSEA's contention that the District unlawfully refused to hire Mr. Ledbetter in a District-funded position, the District could not prevail on a time limitation defense even had it been timely raised. The record establishes that

Mr. Ledbetter's grievances about the hiring of Messrs. Woods and Jones were not denied by the superintendent until June 17, 1980. Section 3541.5 provides that the six-month limitation shall be tolled during the time it took the charging party to exhaust the grievance machinery. At minimum, the time limitation therefore did not begin to run until June 17 and a December 12 filing was within the six-month period.

For these reasons, it is concluded that the time limitation of section 3541.5 did not bar the issuance of a complaint on the present charge. Accordingly, the charge must be addressed on its merits.

Termination of Robert Ledbetter

It is unlawful, under section 3543.5(a) for a public school employer to make threats, impose reprisals, discriminate against or otherwise interfere with, restrain or coerce employees because of their exercise of protected rights. These include the right to form, join and participate in the activities of employee organizations for the purpose of representation on matters of employer-employee relations.[8]

[8]In relevant part, section 3543 provides:

> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to

The PERB has found a violation when an employer's acts interfere or tend to interfere with the exercise of these rights and the employer is unable to justify its actions by proving operational necessity. See Carlsbad Unified School District (1/30/79) PERB Decision No. 89. In Carlsbad, the PERB further decided that a charge will be sustained whenever it is proven that but for the exercise of protected rights, the employer would not have acted.[9]

> refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to section 3544.1 or certified pursuant to section 3544.7, no employee in that unit may meet and negotiate with the public school employer.

[9]The Carlsbad test reads as follows:

> 1. A single test shall be applicable in all instances in which violations of section 3543.5(a) are alleged;
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> 2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;
>
> 3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees

When an employer disciplines or dismisses an employee for unlawful purposes, the actual motive will seldom be revealed in direct evidence. For this reason, the illegal purpose may be inferred from the circumstances surrounding the discipline or discharge. "These may include anti-union animus exhibited by the employer or its agents; the pretextual nature of the ostensible justification for the employer's action; or other failure to establish a business justification." Marin Community College District (11/19/80) PERB Decision No. 145.

Unexplained disparate treatment of an employee is a factor which may be considered in evaluating the employer's motive. Marin Community College District, supra. "The imposition of discipline on an employee organization representative which is in excess of what would normally be imposed clearly tends to result in at least some harm to employee rights by demonstrating that participation in organizational activities

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> will be balanced and the charge resolved accordingly;
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> 4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;
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> 5. Irrespective of the foregoing, a charge will be sustained where it it shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.

may result in discriminatory treatment." Belridge School District (12/31/80) PERB Decision No. 157.

Consideration of these various criteria does not begin, however, unless a threshold requirement is met. There must be some nexus between protected conduct in which an employee has engaged and the imposition of the reprisal. Santa Monica Community College District (9/21/79) PERB Decision No. 103; Grossmont Community College District (3/19/80) PERB Decision No. 117; Cerritos Community College District (10/14/80) PERB Decision No. 141. If the charging party fails to establish this nexus, the contention that the employer violated the statute must fall.

Here, there is no apparent connection between the discharge of Mr. Ledbetter and his participation in protected activities. Mr. Ledbetter was employed under a program which had, by operation of federal law, a definite time for termination. He was aware of this fact from the date he was hired and in the spring of 1980 he knew, even prior to receiving official notice, that his termination date was approaching. Mr. Ledbetter was employed in a job of limited, fixed duration. The termination date was fixed by an outside agency over which the District had no control.

Under these circumstances, it cannot be said that Mr. Ledbetter's termination was connected to his filing of grievances. There simply was no relationship between the two.

The termination of Mr. Ledbetter as a CETA worker was an event apart from anything within the District's control.

CSEA argues, nonetheless, that in the manner in which it terminated Mr. Ledbetter the District violated various provisions of the Education Code. The District responds that the Education Code is not relevant to this proceeding and even if it were, the District applied it properly.

The District is correct that whether or not the termination violated provisions of the Education Code is not a matter for consideration by the PERB. The PERB enforces the EERA and has no authority to enforce the Education Code. CSEA's argument is, therefore, without merit.

For these reasons, the contention that the termination of Mr. Ledbetter was in violation of section 3543.5(a) must be dismissed. There is no other evidence to suggest that the termination was a violation of section 3543.5(b) and so that contention also must be dismissed.

Failure to Hire Mr. Ledbetter for Regularly Funded Job

CSEA next contends that Mr. Ledbetter was denied three District-funded jobs because of his union activities. CSEA argues that the District has an anti-union attitude. This attitude, CSEA continues, is reflected in the conduct of the superintendent at a grievance meeting, the various promotions of Eric Steele during periods when he was not a member of CSEA and the conduct of Pete Neese and other supervisors.

The District responds that the employment process used to hire Messrs. Woods and Jones and Ms. Kolitsch was an impartial civil service procedure. Mr. Ledbetter did not receive any of the three jobs, the District continues, because he was not the best qualified person.

It cannot be denied that Mr. Ledbetter engaged in protected activities. The PERB has held that "Section 3543 protects the right of an individual employee to present a grievance . . . ." South San Francisco Unified School District (1/15/80) PERB Decision No. 112; Mount Diablo Unified School District (12/30/77) EERB Decision No. 44. Doubtlessly, Mr. Ledbetter likewise was engaged in protected activity when he instituted a complaint about the alleged drunkenness and misconduct of Mr. Neese.

Shortly after exercising his rights to participate in protected activity, Mr. Ledbetter was three times rejected for a regularly funded District position. One of the persons on both interview panels was Mr. Neese who was known among District employees as a person who disliked unions. This connection of circumstantial facts is sufficient to establish a prima facie case for violation of section 3543.5(a). The burden then shifts to the District to offer operational justification for its decision not to hire Mr. Ledbetter for one of the permanent positions.

The District's justification is a simple one: Mr. Ledbetter did not score as highly on the civil service exam as did the persons who obtained the jobs. The record abundantly demonstrates that this is true. All three members of the February committee rated Mr. Ledbetter fifth among eight applicants. Even if it were concluded that panel member Neese acted with retaliatory motivations toward Mr. Ledbetter and his score were thrown out, Mr. Ledbetter would fare no better. He still would come out in fifth place, well below the two candidates who were hired. Mr. Jordan, a panel member who was not a District employee, ranked Mr. Ledbetter no higher than did the two District employees on the interview panel.

In the August competition, Mr. Ledbetter was third among four candidates. The position went to Anita Kolitsch, who placed second on the examination. The evidence establishes that Mr. Neese remarked that Ms. Kolitsch was the candidate he wanted and because of this remark, Mr. Steele gave her a higher score. In changing his score, Mr. Steele acted on his own. Mr. Neese does not remember making the remark and there is no evidence to establish that the remark was intended to be anything more than a statement of preference. Mr. Steele's independent act, therefore, cannot be used to establish some unlawful motivation on the part of the District.

It should be noted, moreover, that despite Mr. Neese's statement of preference, Ms. Kolitsch placed second in the

over-all ranking. This fact alone raises a doubt about how much attention the other panel members actually paid to Mr. Neese's comment. All panel members rated Mr. Ledbetter far below the top two finalists. If the grade given by Mr. Neese were discounted and allowances are made for the inflated score given by Mr. Steele, it is apparent that Mr. Ledbetter still would have finished no higher than third among the four candidates.

The District has an important business interest in hiring the persons determined to be the most competent. Hiring the persons who receive the highest scores on examinations is the fairest way to treat competitors and the best way to build a high quality work force. It is true that oral interviews are subjective and susceptible to manipulation and CSEA alleges in effect that the District manipulated the test scores. However, the evidence simply does not support such a contention. The use of three-member panels attenuated the influence of any one member and the consistently low scores given to Mr. Ledbetter by all panel members make it apparent that he would not have gotten the job had he engaged in no protected activities.

Moreover, the evidence of anti-union attitudes among some District administrators is not sufficiently convincing to show that but - for unlawful motivation Mr. Ledbetter would have been hired in a regular job. The conduct of the superintendent at a grievance meeting in February of 1979 establishes little

more than that he was angry about what he considered to be a trivial grievance. The venting of anger is a not uncommon occurrence in labor-management relations. That a person was angry, kicked a chair, threw and book and used swear words, does not prove that he is anti-union. There is no evidence he threatened anyone, promised to retaliate or engaged in any other untoward conduct.

Mr. Machado evidenced an anti-union attitude in warning Mr. Steele that engaging in union conduct was going to cause him trouble. However, he had no role in the hiring process. The only person whose anti-union attitude could have been translated into action was Mr. Neese and, for the reasons discussed above, it is concluded that he did not have a sufficient impact on the hiring process to change the result. Mr. Ledbetter would not have gotten any of the three vacant positions even if Mr. Neese had not participated at all.

For all of these reasons, it is concluded that the District's failure to hire Mr. Ledbetter for one of the three regularly funded custodial positions was not in violation of section 3543.5(a). There is no other evidence to suggest that the refusal to hire was a violation of section 3543.5(b) and so both contentions must be dismissed.

Alleged Refusal to Negotiate

CSEA argues that on at least two different occasions it requested to meet and negotiate with the District about the

termination of Mr. Ledbetter. The District, CSEA continues, refused to honor this demand. In response, the District argues that it had no duty to negotiate about the dismissal of Mr. Ledbetter. The termination was in accord with past practice, the District asserts, and in accord with what was told to Mr. Ledbetter at the time he was hired. Moreover, the District continues, CSEA had waived its right to negotiate in the prior contract. Finally, the District concludes, CSEA never presented a specific proposal, a fact which should be fatal to a failure to negotiate charge.

Section 3543.5(c) obligates a public school employer to negotiate in good faith with an exclusive representative about any matter within the scope of representation. It is well-established that the unilateral change of a matter within scope is per se a violation of the duty to negotiate in good faith. Davis Unified School District et al. (2/22/80) PERB Decision No. 116.

In this case, however, there was no unilateral change. In laying off a CETA-funded employee at the end of that employee's eligibility period, the District acted in accord with past practice. Other CETA workers earlier had been laid off at the end of their eligibility period. The parties were in negotiations at the time the demand to negotiate was made. The District properly treated the proposal as a demand to change the status quo, i.e., to remove the District's then unfettered

right to lay off CETA workers at the end of their eligibility period. CSEA treats this case as if the District by the lay off had changed the status quo. In fact, just the opposite was the case. It was CSEA which was attempting to change the status quo with its proposal.

For these reasons, it is concluded that the District did not violate section 3543.5(c) by terminating Mr. Ledbetter without first negotiating with CSEA. The charge must, therefore, be dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record of this matter, the unfair practice charge filed by the California School Employees Association and its Placer Hills Chapter No. 636 against the Placer Hills Union School District is hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on June 24, 1981 unless a party files a timely statement of exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the executive assistant to the Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on June 24, 1981 in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any

statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the PERB itself. See California Administrative Code, title 8, sections 32300 and 32305, as amended.

DATED: June 4, 1981

Ronald E. Blubaugh
Hearing Officer